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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-130

ROBERT J. QUINN, individually and as Commissioner of the Chicago Fire Department,

Petitioner,

vs.

FRANCIS MUSCARE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR PETITIONER

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Petition For Certiorari Filed July 24, 1975
Certiorari Granted October 14, 1975

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BRIEF FOR PETITIONER

OPINIONS BELOW

The findings of fact, conclusions of law and judgment of the district court in favor of the petitioner are unreported, but are reproduced in the Appendix (pp. 146-153).

The opinion of the court of appeals, filed on March 21, 1975, reversing the judgment of the district court, is reported at 520 F.2d 1212 (7th Cir., 1975), and is reproduced in the Appendix (pp. 158-166).

JURISDICTION

The judgment of the court of appeals was entered on May 21, 1975 (App. 167). On June 17, 1975, the court of appeals entered an order denying the petition of defendant Quinn for a rehearing with suggestions for rehearing in banc (App. 167, 168).

The petition for a writ of certiorari was filed on July 24, 1975. 44 L.W. 3069. It was granted on October 14, 1975. 44 L.W. 3222.

The jurisdiction of this Court rests on 28 U.S. Code § 1254(1).

A petition for a writ of mandamus, based on the issue of the need to convene a three-judge district court herein, was filed by petitioner together with his petition for a writ of certiorari. This petition for mandamus was denied by the Court on October 14, 1975. 44 L.W. 3222. It is assumed in this brief that the question of a three-judge district court was disposed of by that denial of mandamus.

QUESTIONS PRESENTED

(1) Whether, in suspensions for 30 days or less of civil service employees, due process is satisfied by provision for post-suspension hearings, with the right to back pay and deletion of the suspension from the employee's service record, in the event the charges against the employee are disallowed.

(2) Whether a civil service employee, who has been accorded a suspension of 30 days or less, can complain that he has been denied due process if he fails to exercise his statutory right to a post-suspension hearing.

(3) Whether, in the event due process requires a pre-suspension hearing, any administrative hearing must be held if the civil service employee has actual knowledge of the charges against him, knows that he is in violation of a departmental rule and that the charge is based on that violation, and where the only disputed question is whether the rule is constitutional.

(4) Whether a city fire department can constitutionally regulate the dress and hair-style of its firefighters (1) to ensure the efficient operation of gas masks that all firefighters are required to wear in certain emergencies, (2) to present a well-groomed and uniform appearance or image to the public, or (3) to promote discipline in a paramilitary setting.

(5) Whether a city fire department can constitutionally promulgate general safety rules binding on all members of the department, even though such rules may not be actually necessary with respect to certain individual members.

CONSTITUTIONAL PROVISIONS, STATUTES AND ADMINISTRATIVE REGULATIONS INVOLVED

Constitution Of The United States

Amendment I:

> "Congress shall make no law . . . abridging the freedom of speech . . ."

Amendment V:

> "[N]or shall any person . . . be deprived of life, liberty or property without due process of law."

Amendment XIV:

> ". . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

United States Code

Title 42, § 1983:

> "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Illinois Revised Statutes 1973

Chap. 24, par. 10-1-18

> "Except as hereinafter provided in this section, no officer or employee in the classified civil service of any municipality who is appointed under the rules and after examination, may be removed or discharged or suspended for more than 30 days, except for cause upon written charges and after an opportunity to be heard in his own defense . . . Nothing in this Division 1 limits the power of any officer to suspend a subordinate for a reasonable period, not exceeding 30 days except that any employee or officer suspended for more than 5 days or suspended within 6 months after a previous suspension shall be entitled, upon request, to a hearing before the civil service commission concerning the propriety of such suspension. . . ."

Rules and Regulations of the Chicago (Illinois) Fire Department

Section 51.133:

> "All members of the Chicago Fire Department shall present a clean and proper appearance in personal care and attire at all times. The face shall be clean-shaven, except that a non-eccentric mustache is permissible. Mustaches shall not extend beyond a line perpendicular to the corner of the mouth and the full upper lip must be readily visible.
>
> "Sideburns shall be trimmed short and shall be no lower than a line from the middle of the ear.
>
> "Hair shall be worn neatly and closely trimmed, and the hair outline shall follow the contour of the ear and slope of the back of the neck. It will be gradually tapered overall in order to present a neat appearance."

Part VI:

"OFFENSES, PROCEDURES AND PENALITIES IN RESPECT TO VIOLATIONS OF THE RULES AND REGULATIONS, PRACTICES AND PROCEDURES OF THE CHICAGO FIRE DEPARTMENT."

* * *

Section 61.006:

"Disobedience of Orders."

STATEMENT

The Facts

Respondent Francis Muscare has been a firefighter with the Chicago Fire Department since 1955. His rank is that of lieutenant.

From October, 1973, until the trial of this case in March, 1974, Muscare wore a beard (App. 5, 18). He did this despite a department rule, the existence of which he admitted he was well aware, limiting the facial hair which may be worn by firefighters to at most a small moustache and precisely limited sideburns, with no beard (App. 125).

Some three years before, Muscare had worn the same sort of moustache and beard. He had been ordered to shave off the beard, but refused (App. 123). In consequence, at a uniform inspection, his superior officers declined to inspect him and apparently he then at length brought himself into compliance by shaving.

The following year Muscare again grew a beard (App. 124). This time he was summoned before a departmental board, where he was told by a fire chief that he did not know the meaning of discipline and was commanded to shave off his beard before reporting for duty the next day. Muscare reluctantly complied on that occasion also (App. 125).

But in December, 1973, when Muscare appeared with his company at the Chicago Fire Academy for instruction in a two-day course in the use of self-contained breathing apparatus (safety masks), he was again wearing a beard. The instructor, Firefighter Leonard Johnson, later testified that he at that time, on the basis of

instructional material (App. 60), informed Muscare that facial hair should not be worn with the safety masks (App. 53). Muscare disputed this, contending that Boston and New York permit firemen to wear "long hair, beards and moustaches." However, he offered no proof of that (App. 53, 67, 68).

As Instructor Johnson explained at the trial (App. 62), the self-contained breathing apparatus consists of an air cylinder, a face piece, a breathing tube and the harness on which the tank is mounted. The whole apparatus can be carried on a man's back. The cylinder is charged to 2216 pounds of pressure per square inch and the gas mask can function for 30 minutes. The gas masks cost about $400 each (App. 100).

Each member of the class was expected to put the apparatus on, charge it and test it to determine whether he was getting a good facial fit with the apparatus charged and with the cylinder and regulator valves open, allowing the high pressure air to flow up through the regulator into the face piece (App. 53, 54). Johnson testified that not only facial hair, but eyeglasses, dentures, oddly shaped faces and sores and boils could interfere with a fireman getting a proper seal (App. 73).

Johnson stated he could tell, by watching a fireman do this, whether he had succeeded in obtaining a tight facial seal. (App. 54).

Muscare failed to charge or test his apparatus in the class at the Fire Academy (App. 54, 56).

On the second day of the class, each student was expected to walk up to the fifth floor of the Fire Academy and then back down to the first floor, with a gas mask on, sealed and functioning (App. 55, 56), Muscare did not do this and, in fact, did not even put the apparatus on (App. 56).

Instructor Johnson stated at the trial that he did not know whether Muscare, while wearing his beard, could get a good seal on a gas mask, because Muscare did not put the gas mask on and a gas mask can be tested only by a man putting it on (App. 71, 72).

After the class was concluded, Instructor Johnson reported Muscare's conduct in the class to the drillmaster (App. 70, 71). According to his complaint, Muscare was "warned" in December, 1973 (App. 5) "that he would not be permitted to continue working as a firefighter unless he shaved his beard off." A few days later, Muscare was advised that charges had been filed against him with the administrative authorities of the Fire Department (App. 19). But, because of the serious illness of the superior officer in whose jurisdiction it lay to determine what disciplinary action, if any, should be taken, the charges against Muscare were not acted upon until February 27, 1974, by which time they had been reviewed and authorized by the Fire Commissioner (App. 105, 108, 110). Meanwhile Muscare continued to wear a beard.

Muscare was disciplined not only for violating the facial hair provisions of Section 51.133 of the Rules and Regulations of the Chicago Fire Department, but also for refusing to carry out a direct lawful order of his superior officers, in contravention of Section 61.006 of the same Rules and Regulations.

On February 27, 1974, three superior officers of Muscare personally came to the fire station where he was on duty and informed him he had been suspended for 29 days, effective immediately.

Muscare did not exercise his statutory right, under Illinois law, to a hearing before the civil service commis-

sion. Illinois Revised Statutes, 1973, ch. 24, par. 10-1-18, provides:

> ". . . [A]ny employee or officer suspended for more than 5 days or suspended within 6 months after a previous suspension shall be entitled, upon request, to a hearing before the civil service commission concerning the propriety of such suspension. . . ."

In the event the civil service commission finds the suspension unwarranted, the employee is entitled to reinstatement, back-pay and erasure of the suspension from his employment record.

Instead of seeking this administrative hearing, Muscare, on March 11, 1974, filed the instant civil rights action under 43 U.S.C. § 1983.

The Trial In The District Court

At the trial on March 19, 1974, Muscare rested on his complaint and supporting affidavit (App. 51). The City put in almost all the testimony (App. 51-121). Muscare then testified briefly in an attempt at rebuttal (App. 121-131).

Acting Chief Fire Marshall William F. Foley of the Chicago Fire Department was a witness for the defense (App. 99-121; 131-136). He explained that the department has used self-contained breathing apparatus, or gas masks, since 1958 (App. 100, 104). They are employed particularly in rescue operations in a hostile environment and in an irascible type of atmosphere containing highly toxic, poisonous gas. They are usually worn at the direction of the company officer. At present there are two such gas masks on each hook and ladder truck. All uniformed members of the Chicago Fire Department are required to be proficient in the use of such self-contained breathing apparatus (App. 103).

Safety, not appearance, Chief Foley declared, is the rationale for the departmental rule restricting the facial hair that may be worn by uniformed firefighters to small, precisely limited sideburns, with no beard (App. 118). Facial hair in excess of these limitations, Chief Foley explained, interferes with the operation of the gas masks. In firefighting mistakes can be fatal.

A fire department is a paramilitary organization, Chief Foley also stated, because the department has levels of rank and firemen are expected to carry out orders. The fire department is a uniformed force, and cleanliness and neatness are a part of being uniformed.

Another witness for the defendant was Al Lundin, an officer of the Mine Safety Appliance Company of Pittsburgh, manufacturers of personal protective devices and particularly of self-contained breathing apparatus used by the Chicago Fire Department. Mr. Lundin also taught a course in the use of such safety devices at the National Safety Council in Chicago, where he gave instruction in the basics of respiratory protection to a student body of safety directors of various companies located throughout the United States (App. 82, 83). Lundin declared it to be his expert opinion that facial hair would adversely affect the obtaining of a facial seal on self-contained breathing apparatus of the types used by the Chicago Fire Department. Lundin explained that a perfect seal is possible, so that, during tests with various odorants, "it feels like there is absolutely no leakage at all." During tests the individual fireman is expected to be able to carry on normal activities, such as talking and coughing, with his face sealed in the mask.

But although the gas masks are designed to fit all faces, the differences in facial sizes and shapes, Lundin elucidated, can result in facial hair having less effect on

obtaining a seal for some individuals than others. As he said, "it is very difficult to form a seal to the face under the best conditions, and facial hair is going to endanger that," and, as the fireman engages in various strenuous activities during the course of a fire, the seal is apt to be more easily broken if facial hair is worn.

Therefore, it was Lundin's expert opinion, that facial hair would adversely affect the obtaining of a facial seal on self-contained breathing apparatus of the types used by the Chicago Fire Department (App. 86-88).

Muscare testified briefly by way of rebuttal (App. 121-131). He stated he had been a member of the Chicago Fire Department almost 20 years. Muscare admitted he was familiar with the fire department regulation concerning facial hair and that he had read it at roll call. In fact, he volunteered the information that he had twice in the past been formally reprimanded for wearing a beard in violation of the rule, and that on each occasion he had complied by shaving it off.

Muscare affirmed he had tested the apparatus while wearing a beard and that he had gotten a good fit and the apparatus worked. But he did not attempt to validate that assertion by a demonstration in court. Muscare presented no expert witnesses on gas masks. Nor did he put any other firemen on the witness stand to recount their experience with the department's gas masks while wearing facial hair.

The Opinion Of The District Court

At the conclusion of the hearing on a preliminary injunction on March 19, 1974, District Judge Frank McGarr, in denying the application, entered oral findings of fact and conclusions of law (App. 146-150),

which he later made applicable to his denial of a permanent injunction on March 29, 1974 (App. 151-153).

The district judge affirmatively recognized that the wearing of facial hair is a form of expression protected by the First Amendment (App. 147). He found that Muscare's appearance, as depicted in the photographs he introduced into evidence as Plaintiff's Exhibits A and B was substantially identical with his appearance in the courtroom (App. 147, 148). The court found that Muscare's small moustache was not in violation of departmental regulations, but that his full goatee, or small beard, was "clearly prohibited" by Regulation 51.133 of the Chicago Fire Department.

The question presented, the court stated, is "whether this regulation is a violation of the plaintiff's rights to First Amendment expression or whether, in fact, it is a reasonable curtailment of his rights for some justifiable and good reason which the Department advances" (App. 147, 148).

The district court did not regard as determinative the evidence as to whether Muscare's facial hair actually did or did not interfere with his effective personal use of a gas mask. The court declared (App. 148):

> "What we have before us is the validity of a regulation and its reasonableness generally. And the question of whether it is reasonable in terms of the individual context, which was raised here, I don't think is relevant."

The safety reason for the regulation, which the department advanced in its justification, the court found adequate to sustain the regulation's constitutionality—whether or not safety was the basic reason for the adoption of the regulation. The district court concluded that the regulation is merely minor abridgement of personal

liberty, which is justified by safety requirements (App. 149).

The court expressly refrained from assessing the substantiality of the public image and the paramilitary discipline rationales the department also urged.

Nor did the district court rule on the question of whether the department's suspension procedure provided due process. That issue was raised in the complaint (App. 7). But the plaintiff offered no evidence in support of that contention and did not urge that issue at the trial.

However, in a motion, filed March 26, 1975, for reconsideration or amendment of the judgment (App. 144, 145), Muscare argued that "even where the state can reasonably assert that a legislative regulation accurately applies to most people falling into a classification, when a case-by-case determination is available, the due process clause requires such an individualized determination" (App. 141-143). Averring (App. 143) that "[s]uch a test is not merely available; it is currently in use," counsel for plaintiff contended that "where, as here, the general rule invades a fundamental constitutional right, such a general regulation is unconstitutional."

The motion also maintained (App. 144) that Muscare had been denied due process, on the basis of his unsubstantiated assertion that he had been "cut off from his job" "[w]ithout notice of the charges against him, without an opportunity to be heard in his own defense."

On March 29, 1974, the district court denied plaintiff's motion for reconsideration or amendment of its judgment (App. 153).

The Per Curiam Opinion Of the Seventh Circuit

The per curiam opinion of the Court of Appeals for the Seventh Circuit, filed May 21, 1975 [App. 158-166], refrained from attempting to resolve the question of the constitutionality of the fire department's regulation of the facial hair of firemen, on the ground that it found Muscare had been "suspended without procedural due process" (App. 160).

The court of appeals reached this result despite its findings (App. 161) that Muscare's superior officer, Chief Morgan, had in December, 1973, "warned him that he would not be permitted to continue working as a firefighter unless he shaved off his beard" and that, a few days thereafter, Muscare "was informed that charges had been filed against him with the administrative authorities." The opinion also found (App. 161) that two and a half months elapsed after that before Muscare was suspended.

Also disallowed in the opinion was the constitutional adequacy of the provision in Illinois Revised Statutes, 1973, ch. 24, par. 10-1-18, for a post-conviction hearing before the civil service commission concerning the propriety of the suspension, available in cases of suspensions of more than 5 days—a right Muscare had failed to exercise.

The court of appeals ruled that "post-suspension review is insufficient," although it specifically admitted (App. 162) that the Illinois Supreme Court had recently held to the contrary in *Kropel v. Conlisk*, 60 Ill. 2d 17 (decided January 30, 1975).

The per curiam opinion of the court of appeals stated (App. 163) that it considered the decision of this Court in *Goss v. Lopez*, 419 U.S. 565 (decided January 22, 1975),

determinative in resolving the instant case. Recognizing that Muscare had a protected property interest in his employment, the court of appeals saw fit to apply the rationale of *Goss* in the following terms (App. 163):

> "In the circumstances of America's high schools, the court thought that notice, an explanation of the evidence the authorities have, and an opportunity to present his side of the story were sufficient to protect the student, and we think that at least this much is required in the circumstances of a public employee's suspension."

In addition, the per curiam opinion (App. 164) found confirmation of its opinion in *Arnett v. Kennedy*, 416 U.S. 134 (1974).

However, the opinion did recognize (App. 165) that, in a wide variety of emergency situations, "where harm to the public is threatened, and the private interest is reasonably deemed to be of less importance, an official body can take summary action pending a later hearing." But the court of appeals made no attempt to clarify in what sort of specific situations disciplinary action could be taken without a pre-suspension hearing.

The City's petition for rehearing, with suggestions for rehearing in banc, was duly filed on June 4, 1974, and denied on June 17, 1975 (App. 167, 168).

On June 25, 1975, Circuit Judge Stevens entered an order staying the mandate of the Seventh Circuit until July 24, 1975 (App. 168).

The petition for certiorari was filed on the latter date and granted on October 14, 1975 (App. 170).

SUMMARY OF THE ARGUMENT

Respondent Muscare is a firefighter employed by the Chicago Fire Department. That agency has a departmental rule forbidding its firefighters to wear beards. The reason for the rule is that beards interfere with the functioning of the safety masks firefighters are required to wear in emergencies.

Muscare admitted that he was well aware of the rule, that he had twice before during the preceding three years worn a beard in violation of the rule, and that he reluctantly had twice shaved it off on being warned by his superiors that he would be disciplined if he did not do so. But from October, 1973, until March, 1974, he wore a beard in violation of the rule for a third time and refused to remove it despite warnings that he would be disciplined because of it and that charges were being prepared against him. He contended that the rule was invalid because it violated his First Amendment right to determine his own appearance. As a result he was suspended for 29 days.

He did not exercise his right, provided by Illinois statute, to an administrative hearing, with recovery of back pay in the event he was vindicated. Instead, he filed this civil rights action.

In a hearing on Muscare's application for an injunction, the district court ruled that the fire department rule against beards was valid as a safety measure and denied both temporary and permanent injunctions.

On appeal, attention was focused on the issue of procedural due process. The court of appeals reversed the judgment below, ruling that Muscare had been

denied due process because he had not been accorded a hearing prior to being suspended. It disallowed the constitutional sufficiency of the administrative procedure provided by state statute in short suspensions, pursuant to which Muscare had been suspended.

Under the decisions of this Court, such broadside generalization and indiscriminate application with respect to due process, as the court of appeals has here indulged in, are improper. The essence of due process is fairness. Due process does not require any particular form of procedure. Due process is not a technical conception with a fixed content, unrelated to time, place and circumstance. In its ultimate analysis, due process is respect, enforced by law, for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization.

At most, Muscare's rights in his job are not more than property rights. Under the decisions of this Court, where only property rights are involved, due process does not require a hearing in advance of, and not merely after, action taken by a governmental agency. Delay in the determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied.

Muscare was disciplined not only for violating the facial hair rule, but for his open and contemptuous insubordination to his superior officers. Such disruptive behavior by an employee has an adverse effect on fire department discipline and efficiency. The governmental interest in being able to act expeditiously in such cases is substantial and should be upheld.

The opinion of the court of appeals is in conflict with the decisions of this Court in *Arnett v. Kennedy*, 416 U.S. 134 (1973), and *Goss v. Lopez*, U.S. (1975), and the ruling of the Illinois Supreme Court in *Kropel v. Conlisk*, 60 Ill. 2d 17 (1975).

The ruling of the district court, upholding the constitutionality of the facial hair regulation of the Chicago Fire Department is sound, in accord with the great weight of authority, and should be upheld. The City produced expert witnesses who testified to the need for such a rule as a safety measure to safeguard the efficient functioning of gas masks which firefighters must wear in emergencies. Muscare presented no expert testimony. He was corroborated by no other firemen. He did not even try to demonstrate in court that he personally could obtain a good seal on a gas mask while wearing a beard.

ARGUMENT

I.

DUE PROCESS DOES NOT REQUIRE PRE-SUSPENSION HEARINGS.

A.

The Opinion Of The Seventh Circuit Is Based On Its Misreading Of Two Recent Decisions Of This Court: *Arnett v. Kennedy* And *Goss v. Lopez*.

(1) The Seventh Circuit apparently believed that *Goss v. Lopez*, 419 U.S. 565 (1975), supported the result it desired to reach in this case. The per curiam opinion declares (520 F.2d 1212, at 1215; App. 163):

> "Though *Goss* is a 'school' case, it nevertheless points the way to our resolution of the present case."

In like manner, in denying the petition for rehearing, the court of appeals attributed its conclusion to *Goss* (520 F.2d at 1216), which it again interpreted as mandating a pre-suspension hearing.

Goss, however, actually stands for the proposition that a public school student cannot be suspended or expelled unless he is granted a hearing either before or promptly after suspension or expulsion. In so ruling the court was affirming a three-judge district court, which had held that the plaintiff students had been denied due process because they had been suspended without a hearing before or after. And Justice Powell, in dissenting, so understood the opinion of the majority in *Goss*, which he described in the following terms (419 U.S. at 585):

> "The court . . . justifies this unprecedented intrustion into the process of elementary and secondary education by identifying a new constitutional right: the right of a student not to be suspended for as much as a single day without notice and a due process hearing either before or promptly following the suspension."

Indeed, the majority opinion of Justice White in *Goss* recognized (419 U.S. at 577) that:

> ". . . [T]he interpretation and application of the Due Process Clause are intensely practical matters and . . . 'the very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation.' *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961)."

Actually *Goss*, in the context of the school situation, came to a result closely paralleling the conclusion, in an employment context, of the Illinois Supreme Court in *Kropel v. Conlisk*, 60 Ill. 2d 17 (1975), which interpreted the Illinois statute as requiring a hearing, if the employee requests it, promptly after the suspension, in any case of the suspension of a civil service employee for 30 days or less, with the right to back pay and correction of his employment record, if the employee is vindicated.

2. The opinion of the court of appeals also endeavored to find this Court's disposition of *Arnett v. Kennedy*, 416 U.S. 134 (1974), confirmation of its own analysis of the due process question presented here. That effort was based on a misreading of *Arnett v. Kennedy*, with which the opinion of the Seventh Circuit is in direct conflict.

In *Arnett*, it will be recalled, a majority of five justices held that due process is satisfied by administrative procedures which provide for a post-removal hearing, with the right to reinstatement and back pay if the removal decision is later found to have been wrongful.

Kennedy, was a non-probationary federal civil service employee, who was dismissed from his position in the Office of Economic Opportunity for allegedly making recklessly false and defamatory statements about other employees of that agency. It is true that he was by federal statute afforded pre-suspension administrative procedures, including 30 days prior notice, access to the derogatory material against him, and the right to respond both orally and in writing. But Kennedy contended that due process required a trial-type hearing, including the right to counsel and to present witnesses in his own behalf, together with the right to cross-examine adverse witnesses. He brought a civil action for declaratory and injunctive relief to enforce his theory of due process. A three-judge district court in the Northern District of Illinois, in the jurisdiction of the Seventh Circuit, agreed with him.

This Court rejected Kennedy's contention and reversed the district court in a 5-4 decision. Of the five justices in the majority, a plurality of three—the Chief Justice and Justices Stewart and Rehnquist—were of the opinion that the employees' rights were limited to those afforded by the Lloyd-LaFollette Act of 1915 (5 U.S.C. § 7501), which expressly states "no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal." The plurality of three, speaking by Justice Rehnquist, felt that the Due Process Clause does not require any pre-removal procedure beyond that embodied in whatever statute created the expectancy of job retention.

This holding was in accord with *Board of Regents v. Roth*, 408 U.S. 564 (1972), which concerned, however, state, not federal, employment. It is of interest in the case at bar that Chief Justice Burger, in concurring in

Roth, cited his concurring opinion in *Perry v. Sinderman*, 408 U.S. 593 (1972), where he stated (at 603, 604), that in cases involving state employees, the point should be underscored that the relationship between a state institution and one of its employees is essentially a matter of state concern and state law, and that it is only when the state employee has employment rights under state law that he, then, in turn has a right guaranteed by the Fourteenth Amendment to some form of administrative hearing on the cause for curtailment of his employment rights.

In *Arnett*, two justices—Justices Blackmun and Powell—reached the same conclusion as the plurality "on the basis of different reasoning" (416 U.S. at 164). Balancing the property rights of the individual employees in their jobs against the interest of the government in having the discretion expeditiously to remove employees who hinder efficient operation, they held that the due process requirements of notice and hearing were satisfied by a post-removal evidentiary hearing, with reinstatement and back pay should the removal decision be proven to have been wrongful.

In rejecting the contention that due process requires a pre-removal hearing, Justice Powell observed (416 U.S. at 168):

> "Prolonged retention of a disruptive or other unsatisfactory employee can adversely affect discipline and morale in the work place, foster disharmony, and ultimately impair the efficiency of an office or agency. Moreover, a requirement of a prior evidentiary hearing would impose additional administrative costs, create delay, and deter warranted discharges. Thus, the Government's interest in being able to act expeditiously to remove an unsatisfactory employee is substantial."

In the case at bar, the Seventh Circuit apparently thought that the two concurring justices in *Arnett*—Justice Powell and Justice Blackmun—"concurred in the result *solely* because they believed that the statute's provision of notice and opportunity to be heard *prior* to discharge satisfied the minimal requirements of constitutional due process" (*Muscare v. Quinn*, 520 F.2d 1212, at 1216, fn. 4 (1975). (Emphasis supplied.) But Justice Powell's concurring opinion in *Arnett*, in addition to the language already quoted, concerning the need of the government to act expeditiously in removing an unsatisfactory employee, contains the following statement in footnote 4 (416 U.S. at 168):

> "[T]he fact that some federal agencies may have decided to hold evidentiary hearings cannot mean that such a procedure is constitutionally mandated. The Federal Government's general practice to the contrary argues that efficiency is in fact thought to be adversely affected by prior evidentiary hearings."

A sixth member of the Court, Justice White, was of the opinion that, while a property interest in public employment is created by statute, the requisites of due process are defined, not by statute, but by the Constitution. He was of the view that due process requires a hearing at some time before the discharge becomes final, but that this need not be a trial-type hearing and it need not occur before the discharge becomes effective. It is sufficient if there is some kind of a hearing at some time (416 U.S. at 178). However, Justice White concluded that Kennedy had been denied due process because the hearing officer was the person Kennedy was charged with having slandered. On the other hand, the concurring opinion considered due process not to require an impartial pre-removal hearing officer, for the reason

that "an impartial decision-maker is provided at the post-removal hearing where the employee's claims are finally resolved" (416 U.S. at 170, fn. 5).

Three justices—Douglas, Brennan and Marshall—wholly dissented, being of the opinion that due process requires a trial-type pre-discharge hearing.

Under *Arnett*, advance notice and the right of the employee to make an informal written presentation before discharge becomes effective do satisfy due process, but they are not constitutionally mandated. We submit that a careful reading of the several opinions in *Arnett* supports this interpretation. So does the very recent decision of this Court in *Boehning v. Indiana State Employees Assn., Inc.*, ... U.S. ....., 44 L.W. 3275 (decided November 11, 1975), in which this Court reversed the Seventh Circuit with the following comment:

> "Although the question of respondent's federal constitutional right to a hearing at some time in connection with a discharge for cause may already have been resolved in respondent's favor in *Perry v. Sinderman*, 408 U.S. 593 (1972), *Board of Regents v. Roth*, 408 U.S. 564 (1972), and *Arnett v. Kennedy*, 416 U.S. 134 (1973), the tenured employee's right to a pre-removal hearing has been determined by this Court only in the context of a statute providing notice and an opportunity to respond in writing before removal coupled with a full hearing after removal. See concurring opinion of Powell, J., *Arnett v. Kennedy, supra*, at 164, 170."

De facto however, respondent Muscare had at least as much notice and opportunity to state his case as the employee in *Arnett v. Kennedy*, which held that due process was there satisfied. Twice before, Muscare had

been directly ordered to bring himself into conformity with the departmental regulation of facial hair, and he had twice complied by shaving. The third time he stated his opinion that the rule was unconstitutional and deliberately refused to comply.

For several months before his suspension became effective, Muscare had full knowledge that charges against him were being prepared. He knew exactly on what conduct of his the charges were based. Despite this, he made no effort either to persuade his superiors of the justice of his cause or to bring himself into conformity with the regulation. Muscare was treated fairly; he was accorded due process.

B.

The Opinion Of The Seventh Circuit Is In Direct Conflict With The Ruling Of The Illinois Supreme Court in *Kropel v. Conlisk*, Which Is In Accord With The Decisions Of This Court.

The opinion of the court of appeals in the case at bar is in direct conflict with the opinion of the Illinois Supreme Court in *Kropel v. Conlisk*, 60 Ill. 2d 17 (1975), as the court of appeals itself recognized (520 F.2d at 1215; App. 162, 163).

In *Kropel* the Illinois Supreme Court authoritatively reviewed the state civil service statutory provisions relating to employee suspensions. The court was there directly concerned with Illinois Revised Statutes (1973) ch. 24, par. 10-1-18.1, which has to do solely with police officers in municipalities with populations of 500,000 or more (i.e. Chicago) and which by its terms permits Chicago police officers to be suspended for any period of 30 days or less without a hearing. On the other hand the

general statewide civil service statute (Illinois Revised Statutes (1973), ch. 24, par. 10-1-18) grants all civil service employees of Illinois municipalities, with the exception of Chicago police officers, suspended for 30 days or less but for more than five days, or twice or more within six months, the right to a post-suspension hearing, upon request, with the right to back pay, if vindicated.

The Illinois Supreme Court ruled that par. 10-1-18, the general civil service provision, established a statewide policy of granting all civil service employees of Illinois municipalities, if suspended for any period of 30 days or less, the right, upon request, to a post-suspension hearing, with the right to recover back pay, if vindicated, that this statewide policy extended to Chicago police officers, and that it satisfied due process.

In thus liberally construing these state statutes, the Illinois Supreme Court was exercising its constitutional power as the final interpreter of Illinois law. It did so expressly in order to safeguard the validity of the legislation in the light of both the state and federal constitutions (60 Ill. 2d at 19, 26). And in so holding the Illinois Supreme Court reached the same conclusion as that of the majority of the justices of this Court in *Arnett v. Kennedy*, 416 U.S. 134 (1974), who ruled that due process does not require a pre-discharge hearing (*a fortiori*, does not require a pre-suspension hearing).

Due process is amply safeguarded in short civil service suspensions by adherence to the rule of *Arnett v. Kennedy* and *Kropel v. Conlisk*.

Common sense suggests that most civil service suspensions are for short periods of time—most commonly, for but a few days or even only one day. Common sense suggests that most such suspensions are justified and

that, if mistakes occur, they will usually be corrected by informal means. Usually, indeed, the employee does not contest the fairness of the discipline and accepts the penalty without a hearing. Requiring the municipality affirmatively to establish the correctness of every invocation of managerial authority before meting out any suspension, no matter how brief, would place a burden on the municipality disruptive of government efficiency. It can be presumed that it was in view of these considerations that, in *Kropel*, the Illinois Supreme Court concluded (60 Ill. 2d at 36, 37):

> "It is clear from all the statutes and rules set forth above that a major difference between a suspension for less than 30 days and a suspension for more than 30 days is that the latter requires a hearing before the sentence can be imposed. In effect, the department has the duty to go into a hearing and prove its case for suspension of more than 30 days. In the former instance, the burden is on the employee to seek review and establish why the suspension is unwarranted."

C.

In Actual Fact, The Respondent Was Treated With Fairness, Which Is The Essence Of Due Process.

The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation. *Cafeteria Workers v. McElroy*, 367 U.S. 886 (1961).

It may well be that, from a management-employee relations point-of-view, a pre-suspension hearing is, in most instances, preferable to a post-suspension hearing, provided the governmental agency has the available resources. Even so, there are enough emergency situations, which require immediate action, to preclude

the feasibility of an ironclad rule enforcing a requirement of pre-suspension hearings in all cases. In any event, even if pre-suspension hearings are usually preferable, that does not make them a constitutional imperative.

As Chief Justice Warren declared in *Hannah v. Larche*, 363 U.S. 420, 442 (1960):

> " 'Due process' is an elusive concept. Its exact boundaries are undefinable, and its content varies according to specific factual contexts . . . [A]s a generalization, it can be said that due process embodies the differing rules of fair play, which through the years, have become associated with differing types of proceedings. Whether the Constitution requires that a particular right obtain in a specific proceeding depends upon a complexity of factors. The nature of the alleged right involved, the nature of the proceeding, and the possible burden on that proceeding, are all considerations which must be taken into account."

The requirements imposed by the guarantee of due process are not technical, nor is any particular form of procedure required by it. *Inland Empire District Council, L.S.W.V. v. Mills*, 325 U.S. 697, at 710 (1945). Thus, this Court has held that procedural due process does not necessarily require an opportunity for oral argument of a question of law. *Federal Communications Commission v. WJR, the Goodwill Station, Inc.*, 337 U.S. 265 (1949). In some situations, the Court has deemed oral argument essential to a trial hearing. *Londoner v. City and County of Denver*, 210 U.S. 373 (1908). In other situations, the Court has ruled that oral argument may be dispensed with. *Morgan v. United States*, 298 U.S. 468, at 481 (1936). Under the decisions of this Court, procedural due process is "not a matter . . . for broadside generalization

and indiscriminate application." *Federal Communications Commission v. WJR*, 337 U.S. at 277.

In the case at bar the court of appeals has done just that. It has engaged in "broadside generalization and indiscriminate application." It has ruled in so many words that in the case of "[p]ublic employees facing temporary suspensions for less than 30 days . . . due process requires at a minimum that they be granted a hearing prior to suspension where they may be fully informed of the reasons for the proposed suspension and where they may challenge their sufficiency" (App. 164).

This broadside generalization is in contradiction of the principle laid down by this Court in *Bowles v. Willingham*, 321 U.S. 503, at 519, 520 (1944), where, speaking by Justice Douglas, it held that due process does not require that, when the legislature delegates a task to an administrative agency, it shall always provide for a hearing in advance of, and not merely after, any action taken by such agency. That ruling was essentially a reaffirmance of the rationale of *Phillips v. Commissioner of Internal Revenue*, 283 U.S. 589, at 596, 597 (1931), in which, speaking for a unanimous court, Justice Brandeis said:

> "Where only property rights are involved mere postponement of the judicial inquiry is not a denial of due process, if the opportunity given for the ultimate judicial determination of the liability is adequate. *Springer v. United States*, 102 U.S. 586; *Scottish Union and National Insurance Co. v. Bowland*, 196 U.S. 611. Delay in the 255 Ct. 345 judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied."

In determining what is due process of law, regard must be had to substance, not to form. *Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, at 235 (1897) (Harlan, J.). In actual fact, respondent Muscare was treated with fairness, which is the essence of due process. Indeed, his flouting of a fire department rule, well known to all Chicago firefighters, was dealt with in a spirit of forebearance and patience. Muscare's deficiencies as an employee, in this respect, had a history of some three years. He admitted that he was familiar with the departmental safety regulation governing facial hair and that he had read it at roll call (App. 125).

According to his own testimony, Muscare had violated that rule twice before and had twice acknowledged its meaning and force by grudgingly complying, only to violate it again. The third time his contemptuous defiance of the regulation and the orders of his superiors was open and unmistakable. A few days later he was informed that charges against him had been prepared and filed. That was in December, 1973, but, because of the serious illness of the superior officer in whose jurisdiction it lay to determine what disciplinary action, if any, should be taken against him, the charges were not acted upon until February 27, 1974 (App. 5).

The only actual issue in dispute was the constitutional validity of the departmental facial hair rule. But that could not be determined by an administrative hearing.

However, Muscare was disciplined not only for violating the facial hair rule, but also for refusing to carry out a direct lawful order of his superior officers (to shave off his beard), in contravention of Section 61.006 of the Rules and Regulations of the Chicago Fire

Department. That Muscare violated his superior's orders is not disputed; the only issue in dispute as to that is whether the orders were lawful.

It is also undisputed that, under Illinois law, Muscare had a statutory right to a post-suspension hearing, with the right to back-pay and correction of his employment record, in the event he was vindicated. And it is undisputed that he failed to exercise that statutory right.

The procedure followed was appropriate to the case and just to Muscare. He had every opportunity to defend his rights. Such fairness of procedure "[is] due process in the primary sense." *Brinkerhoff-Faris Trust and Savings Company v. Hall*, 281 U.S. 673, at 681 (1930). As Justice Frankfurter stated, in concurring in *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123, at 162, 163 (1958):

> " '[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. Expressing as it does, in its ultimate analysis respect enforced by law for that feeling of just treatment which has been evolved through centuries of Anglo-American constitutional history and civilization, 'due process' cannot be imprisoned within the treacherous limits of any formula. Representing a profound attitude of fairness between man and man, and more particularly between the individual and government, 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the democratic faith which we profess. Due process is not a mechanical instrument. It is not a yardstick. It is a process. It is a delicate process of adjustment inescapably involving the exercise of judgment by those whom the Constitution entrusted with the unfolding of the process."

II.

THE RULING OF THE DISTRICT COURT, THAT LIMITING THE LENGTH OF A FIREMAN'S FACIAL HAIR ON SAFETY GROUNDS, IS CONSTITUTIONAL, SHOULD BE AFFIRMED BY THIS COURT.

The trial of this case in the district court related solely to the question of the validity of the fire department rule limiting the amount of facial hair that may be worn by a firefighter. The district judge upheld the constitutionality of the regulation as a reasonable safety measure. This disposed of the only issue that would have been in dispute if a pre-suspension administrative hearing had been held, the only issue that would have been in controversy if Muscare had exercised his statutory right to a post-suspension hearing.

But the court of appeals failed to reach the question of the validity of the facial hair regulation (App. 160), because it concluded that Muscare had been "suspended without procedural due process". In effect, then, the court of appeals vacated the judgment of the district court as to the constitutionality of the fire department rule, without disallowing the validity of the district court's findings and conclusion.

If this Court concludes that the court of appeals was in error in reversing the judgment of the district court on due process grounds, then it would appear that the judgment of the district court, upholding the validity of the rule, would thereby be reinstated.

There is no good reason why this case should be remanded to the court of appeals, so that it can address itself to the issue of the validity of the rule. If that were done, it can safely be predicted that the losing party

would seek certiorari in this Court. Such multiplication of proceedings is not in the interest of judicial economy.

The decision of the district court that the rule limiting the length of a fireman's facial hair is constitutional is in accord with the great weight of authority, as indeed is clear from the opinion of the court of appeals itself (520 F.2d 1213, fn. 2; App. 160), which cites *Stradley v. Andersen*, 478 F. 2d 188 (8th Cir., 1973), *Yarbrough v. City of Jacksonville*, 363 F. Supp. 1176 (M.D., Fla. 1973), *Akridge v. Barres*, 321 A. 2d 230 (N.J. 1974), *Hordowich v. Board of Police and Fire Commissioners of Melrose Park*, 18 Ill. App. 3d 20 (1974), *Michini v. Rizzo*, 379 F. Supp. 837 (E.D., Pa. 1974), *aff'd* 511 F. 2d 1394 (3rd Cir., 1975), and *Manco v. Town of Irvington*, 313 A. 2d 219 (N.J. 1973), *aff'd*, 313 A. 2d 204 (N.J. 1974), as upholding the validity of such rules.

The various courts of appeal are not in accord as to whether determination of one's own appearance is a right protected by the Constitution. See the summary in *Arnold v. Carpenter*, 459 F. 2d 939, at 941 (7th Cir., 1972), The Fifth, Sixth, Ninth and Tenth Circuits have held there is no such constitutional right. *Stevenson v. Board of Education*, 426 F. 2d 1154 (5th Cir., 1970), *cert. denied*, 400 U.S. 957; *Jackson v. Dorrier*, 424 F. 2d 213 (6th Cir., 1970), *cert. denied*, 400 U.S. 850; *King v. Saddleback*, 445 F. 2d 932, at 940 (9th Cir., 1971). On the other hand, the First, Fourth and Eighth Circuits have held that it is a right of constitutional dimension. *Richards v. Thurston*, 424 F. 2d 1281 (1st Cir., 1970); *Massie v. Henry*, 455 F. 2d 779 (4th Cir., 1972); and *Bishop v. Colaw*, 450 F. 2d 1069 (8th Cir., 1971).

The Seventh Circuit appears to have vacillated. In *Breen v. Kahl*, 419 F. 2d 1034 (7th Cir., 1969), *cert. denied*, 398 U.S. 937, it ruled that the right to determine one's own appearance is a right protected by the Constitution. But in *Miller v. School District Number 167*, 495 F. 2d 658 (7th Cir., 1974), the Seventh Circuit, by Circuit Judge Stevens, declared (at 668):

> "We therefore hold that even if the individual interest in one's appearance may be characterized as an interest in liberty, the denial of public employment because the employer considers the applicant's appearance inappropriate for the position in question, does not in and of itself represent a deprivation that is forbidden by the Due Process Clause."

But all the precedents, even those which most strongly affirm that the right to determine one's own appearance is of constitutional dimension, recognize that that right is subject to reasonable limitations in the interest of public safety. Thus, in *Dwen v. Barry*, 483 F. 2d 1126 (2nd Cir., 1973), the court said (at 1130):

> "We hold only that choice of personal appearance is an ingredient of an individual's personal liberty, and that any restriction on that right must be justified by a legitimate state interest reasonably related to the regulation."

For a definition of what constitutes "substantial justification", the Second Circuit in *Breen* drew upon *United States v. O'Brien*, 391 U.S. 367 at 377 (1968), which set the following criteria:

> ". . . [A] governmental regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to the furtherance of that interest."

The *O'Brien* criteria are met by a fire department regulation limiting the amount of facial hair that may be worn by uniformed and disciplined firefighters who must be able to wear gas masks. It furthers the important and substantial governmental interest in public safety, and the incidental restriction on First Amendment freedoms is no greater than is essential to the furtherance of the governmental interest in public safety.

As the Court stated in *Michini v. Rizzo*, 379 F. Supp. 837, at 848 (Ed. P 2. 1974), *aff'd.* 511 F. 2d 1394 (3rd Cir., 1975), an action brought by discharged firemen to establish their right to choose their own hairstyles and personal appearance:

> ". . . [We] need not be detained by the dispute between the parties as to whether the right of plaintiffs to wear their hair as they choose is a so-called 'fundamental right' which can be overridden only by a compelling governmental interest' or whether it is a non-fundamental right which must defer to any regulation bearing a rational relationship to a legitimate governmental purpose."

The fire department hair regulation is sustainable under either theory. Safety is a compelling governmental interest. The right and duty of officials to achieve maximum safety is determinative. A less restrictive alternative which will reduce infringement of a constitutionally protected right will not do so. In *Michini v. Rizzo*, 379 F. Supp. at 851, 852, the court also observed:

> ". . . [F]irefighting is one of the most hazardous occupations in America. The hazards of firefighting are such that the issue of safety *vel non* is measured in terms of not just cuts or bruises or even broken limbs, but rather serious burns, asphyxiation, and life itself. Moreover, the safety factor concerns not only the individual fireman, but also his fellow firefighters and others who may be trapped in a burning building, for to the extent that a given fireman is hindered in the performance of his duties, the risk to others (and to property) is increased. Accordingly, we cannot measure safety in relative terms. The officials in charge of the Department have a right-and a duty- to seek to achieve *maximum* safety." (Emphasis supplied.)

Yarbrough v. City of Jacksonville, 363 F. Supp. 1176 (M.D., Fla., 1973), was closely similar in its facts to the case at bar—save that the plaintiff in *Yarbrough* put in a far stronger case than Muscare. It was an action by a discharged fireman, who was joined by a firemen's association. They challenged hair-cut regulations issued by the fire chief. The plaintiffs invoked the First, Fifth, Ninth, Tenth and Fourteenth Amendments. The challenged regulations were similar to those attacked here. They also provided that "[m]oustaches are permissible, provided they are neatly trimmed and non-eccentric. The moustache shall not extend beyond a line horizontal with the corner of the mouth." (at 1178) Sideburns could not exceed one inch in width and could not extend beyond the bottom of the ear lobe. As for beards, the Jacksonville regulation specified:

> "Members shall be clean shaven upon reporting for duty and shall remain clean shaven throughout their tour of duty. Beards, bushy sideburns, and eccentric hair styles are forbidden." (at 1178)

On the basis of conflicting testimony—several individual firemen contradicting the statements by fire department officials that beards, bushy sideburns and long hair tend to interfere with the seal of the gas mask, are prone to catch fire, and impair firefighting effectiveness and the safety of firefighters and the public—the court concluded (at 1179):

> "The crux of this discussion is simply that no conclusive determination can be made as to the effect of longer hair styles on the personal safety of firemen and this Court is unwilling to interfere with the reasonable conclusions of the responsible officers in the Fire Protection Division that there is a rational relationship between longer hair and personal safety of its firemen."

In *Yarbrough* the court found (at 1181) the cases involving student hair regulations inapposite, because of the responsibility assumed by firemen to protect the public. It recognized (at 1179) that the effectiveness of a fire department, like that of a police force, depends upon carrying out orders and that it is necessary to maintain discipline, as well as public respect. The court acknowledged that those officials who have passed their working lives in fire prevention and abatement possess far better empirical judgment of what is essential to achieve an efficient and disciplined fire fighting force "than the officers themselves, the public or the predilection of individual judges." (at 1182)

The grooming standards also make the identification of firemen easier. This insures that the public will be aware of fire department presence, that the commands of the firemen will be obeyed. The regulation furthers a substantial governmental interest, namely, the projection of an image that facilitates the effective functioning of the fire department. *Marshall v. District of Columbia*, ... F. Supp. ....., 43 L.W. 2418 (1975).

Muscare's assertion (App. 53) that New York and Boston have long hair and they are not concerned with the problem of tight face seals was unsupported by any citation of authority. As to New York, it is certainly incorrect. The New York City Fire Department's Health

and Safety Standards for Hair and Beards contain the following provisions:

> "Facial hair
>
> "Moustaches are permitted, but shall conform to the following: They must be neatly trimmed; they must not extend beyond the corners of the mouth; they must not extend beyond any portion of the upper lip.
>
> "Beards or goatees are not permitted.
>
> "All members shall be otherwise freshly shaven when reporting for duty."
>
> (Prentice-Hall Public Personnel Administration: Policies and Practices for Personnel, Vol. 2, No. 4, p. 5 (July 30, 1974).)

In the instant case the Chicago Fire Department presented extensive evidence in support of the reasonableness of the departmental rule. Acting Chief Fire Marshall Foley testified as to the use by firefighters of gas masks with self-contained breathing apparatus and as to the experience of the department that beards and other facial hair beyond certain limits are apt to interfere with sealing out the outside atmosphere and toxic fumes in the use of masks. This official view of the fire department was corroborated by the expert opinion of an instructor in the use of gas masks at the National Safety Council School.

An instructor at the Chicago Fire Academy stated that the only way to test the effectiveness of a gas mask on a particular individual is to have the individual wear it and try out its functioning. He testified that Muscare on two different days had failed and refused to do this while wearing his beard.

Muscare did not contradict that testimony. He merely asserted that in his (unverified) experience his goatee did not interfere with the seal of a gas mask on his face. Muscare offered no expert testimony on the subject whatsoever. His contentions were not supported by the testimony of any other firemen as to their experience. Muscare did not attempt to perform in court a demonstration that he could obtain and maintain a seal on a gas mask while wearing a beard and carrying on strenuous physical activities.

The District Judge correctly concluded (App. 148):

> "What we have before us is the validity of a regulation and its reasonableness generally. And the question of whether it is reasonable in terms of the individual context, which was raised here, I don't think is relevant . . .
>
> "After hearing the evidence and examining the exhibits, I find the justification of the Fire Department, that is, the requirement limiting facial hair for reasons of safety related to the fit of the face mask of self-contained breathing apparatus, is neither capricious nor arbitrary justification. It appears to be grounded in reason. And it also appears to involve a minor abridgement of personal liberty, which is justified by safety regulations."

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the court of appeals should be reversed and the judgment of the district court should be affirmed.

Respectfully submitted,

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